

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

KENNETH DILVERN ROGERS,)
)
)
 Petitioner,)
)
)
 v.) **1:10CV776**
)
)
ALVIN KELLER,)
)
)
 Respondent.)

**ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

Petitioner, a prisoner of the State of North Carolina, has submitted a Petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody, together with the \$5 filing fee. For the following reasons, the Petition cannot be further processed.

1. Petitioner has failed to indicate that state court remedies have been exhausted as to the claims he raises. [28 U.S.C. § 2254(b).] In fact, he explicitly indicates that he still has a direct appeal and attempt at collateral review pending in the state courts. He must fully exhaust his claims in state court before bringing them in this Court.

Because of this pleading failure, this particular Petition should be filed and then dismissed, without prejudice to Petitioner filing a new petition on the proper habeas corpus forms with the \$5.00 filing fee, or a completed application to proceed *in forma pauperis*, once he has exhausted his state court remedies. The Court has no authority to toll the statute of limitation. Therefore, Petitioner must act quickly if he wishes to pursue a petition once his direct appeal and other state court proceedings conclude. *See Spencer v. Sutton*, 239 F.3d

626 (4th Cir. 2001). To further aid Petitioner, the Clerk is instructed to send Petitioner a new application to proceed *in forma pauperis*, new § 2254 forms, and instructions for filing a § 2254 petition, which Petitioner should follow. The Clerk should also return Petitioner's \$5 filing fee.

In forma pauperis status will be granted for the sole purpose of entering this Order and Recommendation.

IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Order and Recommendation. The Clerk is instructed to return Petitioner's \$5 filing fee and send Petitioner § 2254 forms, instructions, and a current application to proceed *in forma pauperis*.

IT IS RECOMMENDED that this action be filed, but then dismissed *sua sponte* without prejudice to Petitioner filing a new petition once he has exhausted his claims in state court.

/s/ L. Patrick Auld

L. Patrick Auld
United States Magistrate Judge

October 18, 2010